

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 112109
 v. :
 :
 MARVIN HOWARD, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: January 25, 2024

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CR-21-662637-A and CR-21-664629-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting
Attorney, and Rachel E. Cohen, Assistant Prosecuting
Attorney, *for appellee*.

Gregory T. Stralka, *for appellant*.

EMANUELLA D. GROVES, J.:

{¶ 1} Defendant-appellant, Marvin Howard (“Howard”), appeals his convictions of rape and illegal conveyance of drugs in a detention facility. For the reasons that follow, we affirm.

Procedural and Factual History

{¶ 2} Howard was indicted on August 27, 2021, in Cuyahoga C.P. No. 21-662637-A (“662637”) and charged with two counts of rape, in violation of R.C. 2907.02, two counts of gross sexual imposition, in violation of R.C. 2907.05, and two counts of theft in violation of R.C. 2913.02. On October 26, 2021, Howard was indicted in Cuyahoga C.P. No. 21-664629-A (“664629”) and charged with illegal conveyance of drugs into a detention facility in violation of R.C. 2921.36 and four counts of drug possession, in violation of R.C. 2925.11. After several pretrials Howard entered a plea agreement in both cases on August 29, 2022. (Tr. 55-57.)

{¶ 3} During the plea hearing, the trial court proceeded with questions concerning Howard’s state of mind. Howard said he was not under the influence of illegal drugs or alcohol but that he had not been taking his prescribed medications. Howard said that he understood the terms of the plea and the potential penalties he faced.

{¶ 4} When asked if he had been threatened to enter a change of plea Howard responded, “Yeah.” The trial court asked Howard’s counsel if they had threatened him. Counsel stated they had not threatened him and tried their best to explain his rights and the possible consequences of taking the plea or a trial. The court asked Howard if anyone had promised him anything to get him to change his plea to guilty, he responded, “Lesser time.” The trial court confirmed with Howard that he understood that there was no promise from the court other than a base sentence of between 7-12 years. Throughout the hearing, the court asked Howard if he

understood what she was saying. Howard said that he understood the terms of the plea and the potential penalties he faced.

{¶ 5} In 662637, Howard pleaded guilty to one count of rape, a felony of the first degree. In 664629, Howard pleaded guilty to one count of illegal conveyance of drugs into a detention facility, a felony of the third degree. Both cases were scheduled for sentencing on September 27, 2022.

{¶ 6} At the start of the sentencing hearing, Howard informed the court, pro se, that he wished to withdraw his plea. He repeated himself numerous times. The trial court informed Howard that the court jail liaison had investigated his claim that he had not been taking his medications and concluded that Howard had been compliant in taking all prescribed medications. The court delayed the sentencing hearing and held a hearing on Howard's motion to withdraw his plea.

{¶ 7} The trial court noted: 1) Howard had been represented by competent counsel and afforded a full plea hearing under Crim.R. 11, and 2) the trial court gave full and impartial consideration to Howard's request to withdraw his guilty pleas. The trial court concluded that Howard had a change of heart and lacked a sufficient basis for the court to grant his plea withdrawal request. The court denied Howard's motion to withdraw his plea and began the sentencing hearing.

{¶ 8} The trial court offered Howard an opportunity to make a statement as it relates to sentencing. Howard stated repeatedly, "I withdraw my plea" and "I want a mistrial." After numerous warnings, the trial court removed Howard from the courtroom and provided a Zoom link for him to hear the sentencing from a holding

cell. (Tr. 81, 82.) Howard was sentenced to an indefinite sentence of 11 to 16 years on 662637, and 1 year on 664629, to be served consecutively.

{¶ 9} Howard raises the following assignments of error on appeal.

Assignment of Error No. 1

The trial court erred when it accepted Howard's guilty plea without first determining the nature of his prescribed medication and the effect it may have on his ability to understand the consequences of his plea.

Assignment of Error No. 2

Howard's plea was not voluntarily entered because the trial court failed to ensure that Howard had not been threatened into entering a change of plea.

Assignment of Error No. 3

The trial court erred when it denied his request to withdraw his plea before sentencing.

Assignment of Error No. 4

Howard was denied effective assistance of counsel.

Law and Analysis

{¶ 10} For ease of analysis, we will discuss Howard's assignments of error out of order and together as necessary.

Crim.R. 11

{¶ 11} Howard argues in his first and second assignments of error that his plea was not knowingly, intelligently, or voluntarily made because the trial court failed to inquire after he informed the court that he had not been taking his prescribed medications and was threatened to accept the plea offer.

{¶ 12} On review, an appellate court considers whether a plea was knowingly, intelligently, and voluntarily entered by reviewing the record de novo. *State v. Spock*, 8th Dist. Cuyahoga No. 99950, 2014-Ohio-606, ¶ 7. The court must examine the totality of the circumstances in determining whether the trial court complied with Crim.R. 11. *Id.*

{¶ 13} It is well settled that Crim.R. 11 requires the trial court to ensure that a change of plea is made knowingly, intelligently, and voluntarily. Crim.R. 11(C)(2). *State v. Robinson*, 8th Dist. Cuyahoga No. 110467, 2022-Ohio-1311, ¶ 20. Before concluding that a trial court complied with Crim.R. 11, we must determine if the record reflects that the court personally addressed the defendant, the decision to change his plea was voluntary, and the defendant understood the nature of the charges and the maximum penalties he faced. Crim.R. 11(C)(2)(a)-(b). Furthermore, we must determine whether the trial court ensured that the defendant understood his constitutional rights and that his guilty plea waived these rights before accepting the guilty plea. Crim.R. 11(C)(2)(c). “Failure on any of those points renders enforcement of the plea unconstitutional under both the United States and the Ohio Constitutions.” *State v. Barnes*, 172 Ohio St.3d 63, 2022-Ohio-4486, 222 N.E.3d 537, ¶ 15.

{¶ 14} In support of his claim, that his guilty plea was not intelligently and knowingly entered, Howard points to *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, which held that additional inquiry is necessary into a

defendant's mental state once a defendant seeking to enter a guilty plea has stated that he is under the influence of drugs or medication. *Id.* at ¶ 66.

{¶ 15} Nonetheless, “A defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel.” *State v. Moore*, 8th Dist. Cuyahoga Nos. 108962, 108963, 108964, 2020-Ohio-3459, ¶ 41, quoting *Bock*, 28 Ohio St.3d 108, 502 N.E.2d 1016 (1986); *State v. Hawkins*, 8th Dist. Cuyahoga No. 108057, 2019-Ohio-4162, ¶ 17. Howard asserted that he had not taken his prescribed medication in the instant case. After further inquiry, Howard admitted that he takes his medication when they give it to him. Additionally, Howard appeared in person throughout the pendency of the case, which provided the trial court several opportunities to observe Howard's behavior further.

{¶ 16} Furthermore, during the plea colloquy, Howard acknowledged that he did understand the purpose of the plea hearing. (Tr. 55-56.) The trial court engaged in further inquiry and took steps to ensure that Howard's state of mind did not inhibit his ability to knowingly and intelligently enter a change of plea. Notably, the court spent significant time explaining to Howard the constitutional rights he would be waiving if he entered guilty pleas before accepting his change of plea. The record reflects that Howard understood the nature of the charges and the maximum penalties he faced.

{¶ 17} Regarding the second assignment of error, Howard challenges his plea's voluntariness. Howard argues the court failed to properly inquire when he

answered, “Yeah” in response to the court’s question, “[H]as anyone threatened you or promised you anything to get you to change your plea?” We find Howard’s argument unpersuasive.

{¶ 18} The record reveals the trial court responded to Howard’s allegation of being threatened. The court asked Howard, “Who’s threatened you?” When Howard did not respond, the court asked his attorneys whether they had threatened him to change his plea. (Tr. 56.) Howard’s attorneys replied that they had not threatened him. Further, they responded that they explained to Howard his rights and the possible consequences and outcomes of pleading guilty or proceeding to trial. Howard did not respond further to the court’s inquiry concerning whether he was threatened to accept the plea. The trial court proceeded with the colloquy. (Tr. 70-71.)

{¶ 19} Given a thorough review of the record, we find Howard knowingly, intelligently, and voluntarily changed his plea. Accordingly, his first and second assignments of error are overruled.

Withdrawal of Plea

{¶ 20} In his third assignment of error, Howard argues the trial court erred when it denied his motion to withdraw his guilty plea before sentencing.

{¶ 21} An appeals court reviews a trial court’s decision to grant or deny a motion to withdraw a plea before sentencing for an abuse of discretion. *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). A trial court does not abuse its discretion when it denies a motion to withdraw a guilty plea after considering 1)

whether the defendant is represented by competent counsel; 2) whether there was a full hearing, pursuant to Crim.R. 11, before entering a plea; 3) whether the trial court conducted a full and impartial hearing on the motion to withdraw the plea and; 4) whether the trial court gave full and fair consideration to the motion to withdraw the plea. *State v. Peterseim*, 68 Ohio App.2d 211, 213-214, 428 N.E.2d 863 (8th Dist.1980).

{¶ 22} Along with the *Peterseim* factors, reviewing courts have established a nonexhaustive list of additional factors a trial court should consider before deciding a motion to withdraw a presentence guilty plea. These factors include whether 5) granting the motion will prejudice the state; (6) the timeliness of the motion; (7) the motion states specific reasons for withdrawal; (8) the defendant understood the nature of the charges and the possible penalties; and (9) whether the defendant is innocent or has a plausible defense. *State v. Johnson*, 8th Dist. Cuyahoga No. 111448, 2023-Ohio-371, ¶ 28, citing *State v. Pames*, 8th Dist. Cuyahoga No. 110647, 2022-Ohio-616, ¶ 29-42.

{¶ 23} Howard offers *Barnes* in support of his argument that the motion to withdraw his guilty plea must be freely and liberally granted. *Barnes* at ¶ 30, quoting *Xie* at 527; *see also Johnson* at ¶ 41. The trial court must start from a presumption that the motion to withdraw a presentence plea will be granted. *Barnes* at ¶ 21. However, it is well-established that a defendant does not have an absolute right to withdraw a plea. *Xie* at paragraph two of the syllabus. A trial court does not abuse its discretion when, absent new evidence, it considers the factors outlined in *Pames*

and determines that the defendant has no legitimate basis for withdrawing the plea.¹ *Pames* at ¶ 29.

{¶ 24} In *Barnes*, the defendant, joined by counsel, filed a motion to withdraw his plea the morning he was scheduled for sentencing. Barnes learned of video evidence that he believed substantiated his claim of self-defense, after pleading guilty. The defendant argued that he would not have pleaded guilty had he known about the video. The Supreme Court clarified that evidence: (1) previously withheld from the defendant; (2) that if known, would have changed the defendant's decision to plead guilty, is a reasonable and legitimate basis to withdraw a guilty plea before sentencing. See Crim.R. 32.1 and *Barnes* at ¶ 37. The present case is distinguishable from *Barnes*.

{¶ 25} Unlike *Barnes*, Howard's counsel did not join in his oral motion to withdraw his plea. Moreover, Howard did not request to represent himself. The record indicates that Howard was represented by highly competent counsel throughout the pendency of the case. Howard's motion to withdraw his plea was improperly before the court because it would have resulted in impermissible hybrid representation. A trial court does not abuse its discretion when it denies a pro se motion to withdraw a plea where counsel simultaneously represents the defendant. "The Supreme Court of Ohio has clarified that hybrid representation is not

¹ The factors outlined in *Pames* are collectively, the nine factors identified in *Peterseim, Heisa, and Moore*. *State v. Peterseim*, 68 Ohio App.2d 211, 428 N.E.2d 863 (8th Dist.1980); *State v. Heisa*, 8th Dist. Cuyahoga No. 101877, 2015-Ohio-2269. *State v. Moore*, 8th Dist. Cuyahoga Nos. 108962, 108963, and 108964, 2020-Ohio-3459, ¶ 56, respectively.

permitted in Ohio.” *State v. Pollard*, 8th Dist. Cuyahoga No. 110008, 2021-Ohio-2520, ¶ 12, quoting *State v Harris*, 8th Dist. Cuyahoga No. 108377, 2020-Ohio-5425, ¶ 32 (when counsel represents a defendant, a trial court cannot consider his pro se motion). *State v. Pierce*, 8th Dist. Cuyahoga No. 107752, 2019-Ohio-3762, ¶ 9.

{¶ 26} Although Howard’s pro se motion was not properly before the court the trial court, nonetheless, considered Howard’s request to withdraw his plea in a separate hearing. The record reveals that during the plea-withdrawal hearing the court properly considered that Howard was represented by highly competent counsel who did not join in his oral motion. Furthermore, his counsel negotiated terms that significantly reduced Howard’s potential prison sentence.

{¶ 27} The trial court determined that Howard was afforded a full Crim.R. 11 hearing before entering his guilty plea. The trial court reviewed the transcript of the plea hearing and found that, during the plea, it had complied with Crim.R. 11 and found that Howard’s guilty plea was knowing, intelligent, and voluntary.

{¶ 28} The court determined that Howard understood the nature of the charges and maximum potential penalties he faced by entering a guilty plea. The trial court asked him if he understood throughout the plea and Howard acknowledged that he understood the colloquy.

{¶ 29} Despite the motion being improperly before the court, the trial court conducted a full and impartial hearing on Howard’s motion to withdraw the plea and fully considered Howard’s request. Moreover, Howard did not raise a lack of

knowledge, incapacity, or allege that his plea was induced as the basis for wanting to withdraw his plea.

{¶ 30} Howard failed to articulate a legitimate basis for withdrawing his plea. Howard offered as reasons for withdrawing his plea that he was innocent of the most serious charges. He also argued that a potential prison sentence of seven years was too long to be away from his family. A trial judge must determine whether a claim of innocence is simply an accused's change of heart about the plea agreement. *State v. Elliott*, 8th Dist. Cuyahoga No. 103472, 2016-Ohio-2637, ¶ 30. It is well-settled that a “change of heart regarding a guilty plea and the possible sentence is insufficient justification for the withdrawal of a guilty plea.” *State v. Resto*, 8th Dist. Cuyahoga No. 109109, 2020-Ohio-4299, ¶ 22, quoting *Elliot* at ¶ 30.

{¶ 31} After consideration of the relevant factors, the court determined that Howard offered no legitimate reason to vacate his plea. Accordingly, the trial court did not abuse its discretion when it denied Howard's motion to withdraw his plea. Howard's third assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 32} Howard argues ineffective assistance of counsel in his fourth assignment of error. The standard of review for ineffective assistance of counsel is whether the trial counsel's performance fell below acceptable standards and prejudiced a defendant's case. *State v. Delgado*, 8th Dist. Cuyahoga Nos. 60587 and 60588, 1992 Ohio App. LEXIS 3112 (June 11, 1992). See also *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989); *Strickland v. Washington*, 466 U.S. 668,

104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Malesky*, 8th Dist. Cuyahoga No. 61290, 1992 Ohio App. LEXIS 4378, 4 (Aug. 27, 1992). An allegation by a defendant that his guilty plea was induced alone is “insufficient to support a claim of ineffective assistance of counsel and would not be upheld on appeal unless it is supported by affidavits or other supporting materials, substantial enough to rebut the record which shows that his plea was voluntary.” *State v. Byas*, 11th Dist. Lake No. 2021-L-064, 2022-Ohio-1814, ¶ 26. A defendant waives a claim of ineffective assistance of counsel by a guilty plea, except to the extent that it caused the plea to be less than knowing, intelligent, and voluntary. *Elliott* at ¶ 21.

{¶ 33} As a preliminary matter, Howard did not raise the issue of withdrawing his plea until just before sentencing. He did not file a motion, nor request to represent himself. Howard argues that his counsel’s failure to join his motion to withdraw his plea is the basis for his claim of ineffective assistance of counsel.

{¶ 34} “A defendant receives ineffective assistance of counsel when his trial counsel ‘fails to act on his request to withdraw his plea when the possibility that he would have been allowed to withdraw his plea is not insubstantial.’” *State v. Drake*, 8th Dist. Cuyahoga No. 93761, 2010-Ohio-1065, ¶ 11, quoting *State v. Strutton*, 62 Ohio App.3d 248, 252, 575 N.E.2d 466 (2d Dist.1998). *State v. Hicks*, 8th Dist. Cuyahoga No. 106101, 2018-Ohio-1964, ¶ 32. However, nothing in the record before this court indicates a substantial possibility that Howard would have been allowed to withdraw his guilty plea. “A defendant’s protestations of innocence alone are not

sufficient grounds for vacating a plea that was voluntarily, knowingly, and intelligently entered.” *State v. Minifee*, 8th Dist. Cuyahoga No. 99202, 2013-Ohio-3146, ¶ 27.

{¶ 35} Moreover, the record reveals that Howard wanted to withdraw his plea due to a change of heart. Since Howard failed to offer a reasonable legitimate basis for his demand to withdraw his plea, the trial court would have denied his motion even if his counsel had acted on his request. For the preceding reasons, Howard’s counsel was not prejudicially ineffective when they failed to join his motion to withdraw his plea. Howard’s fourth assignment of error is overruled.

{¶ 36} Judgment is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EMANUELLA D. GROVES, JUDGE

MARY J. BOYLE, J., CONCURS;
LISA B. FORBES, P.J., CONCURS IN JUDGMENT ONLY